CAPITAL PUNISHMENT IN MASSACHUSETTS

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PREFATORY NOTE

The murder of State Trooper George L. Hanna on February 26, 1983, prompted me to undertake a detailed study of the legislative and judicial development of Ch. 554 of the Acts of 1982. This brief history of capital punishment was a result of that study, and is based on materials that I have gathered over a period of twenty-five years, as a State Senator and, currently, as District Attorney.

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by
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No single issue has created more continual controversy in Massachusetts over the last three decades than the death penalty. Precisely because both proponents and opponents have been — and are — motivated not only by sincerity but also by intensely-held convictions and beliefs, the debate has been heated and enduring.

In recent years, however, two new factors have affected the context of the debate. In December, 1982, then-Governor Edward F. King signed into law a new statute specifically authorizing the use of the death penalty in connection with conviction of certain specified crimes. And, on February 26, 1983, State Trooper George L. Hanna was shot while stopping a car for questioning of its occupants in the parking lot of a liquor store in Auburn. George Hanna died that same night at St. Vincent's Hospital in Worcester. He was the first Massachusetts State Trooper in thirty years to be slain in the line of duty.

The killing of a State Trooper acting in the line of duty was one of the crimes for which death was a sentence specifically authorized by the newly enacted capital punishment law. The trials following his death would involve the first application of the untested statute. Because the crime took place within Worcester County, prosecution of the case became the responsibility of my office.

As District Attorney, two particular considerations were in the forefront of my mind. First, it seemed essential that we bring the law into perspective through an understanding of the long history and evolution of the capital punishment statute in the Commonwealth. Second, because the statute was an untested law, common sense dictated that any questions concerning its constitutionality be brought into the open and determined in advance of any trial. Otherwise, a lengthy, painful, and

expensive series of trials and appeals might be initiated, only to be eventually rendered meaningless by a possible ruling of a state or federal appellate court that the law was unconstitutional in some or all of its provisions.

Superior Court Associate Justice John J. Irwin was assigned to preside at the trials of the men charged with the murder of Trooper Hanna. In response to a motion from my office, Justice Irwin referred a number of questions concerning the constitutionality of certain sections of the statute to the Massachusetts Supreme Judicial Court. On February 1, 1984, the Justices of the Supreme Judicial Court agreed that those questions should be reviewed before the defendants were tried. On October 18, 1984, our highest state court ruled that certain sections of the law did violate provisions of the Massachusetts Constitution. As a result, the law was invalidated, the defendants in the Hanna case could not be sentenced to death if found guilty, and the whole debate concerning the use of capital punishment entered a new phase.

Contrary to the views held by many people, there has always been a provision for the death penalty among the statutes of the Commonwealth. In fact, since 1900 the imposition of the death penalty in Massachusetts has resulted in 65 executions. The last execution took place in 1947. From 1947 to 1958, juries continued to find offenders guilty of murder and the death sentence was imposed. But no executions were carried out. Convicted murderers either spent an indeterminant amount of time on "death row" (There were still 7 men on "death row" in the Massachusetts Correctional Institution at Walpole as late as 1972), or their sentences were commuted by the Governor and the Governor's Council to life imprisonment.

By 1958 the contradiction between the judicial imposition of the death penalty and the executive moratorium on executions had come to the attention of both the general public and the Massachusetts Legislature. A special legislative commission was

established, and the result was the first extensive examination of arguments for and against capital punishment in Massachusetts.[1]

It is startling to read today the report of that 1958 Commission and discover how exactly and exhaustively the authors anticipated the basic arguments which still are the major issues debated today. The findings of the 1958 Commission demonstrate how little the general content of this particular debate has changed over the intervening years. Consequently, this report serves as an excellent starting point for an understanding of our current situation in the Commonwealth.

The Commission organized its analysis of the issue with eight basic lines of investigation:

1) examination of British and Canadian experiences and studies;

2) comparision of the past and present laws of all the State and the Federal governments;

3) previous legislation and experience in Massachusetts;

4) data on the effects of the use of the death penalty in other states;

5) the relationship of the use of the death penalty to the rates of criminal homicide and/or murder in Massachusetts;

6) the problems of mental responsibility;

[1]*Report and Recommendations of the Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases, December 30, 1958. (House Document No. 2575). Cited hereafter as Capraro Commission.*

7) the effects of the death penalty on the administration of the state's judicial system;

8) moral arguments for and against the death penalty.

As these organizational topics indicate, the Commission approached its task with deliberation and an admirable regard for thoroughness. The quality of the research involved gave added weight to the findings of the Commission.

The majority of the members of the Commission took the position that "there appears, in fact, to be no greater deterrent effect in capital punishment than in a sentence of life imprisonment."[2] Consequently they reported that they were "persuaded that the social usefulness of capital punishment is insignificant and is far outweighed by its considerable social damage."[3] It was the recommendation of the majority members of the Commission that the death penalty, which had not been applied in Massachusetts since 1947, should be abolished and that "the penalty for murder in the first degree. . . [should] be a mandatory sentence for life without eligibility for parole."[4]

The minority members (including the Chairman of the Commission, Representative Charles W. Capraro of Boston) based their dissent on their conviction that the death penalty was in fact a deterrent: "the claim that the death penalty itself, decreed for committing of a major crime, will not exercise a deterring influence on the great majority of potential criminals, contradicts one of the fundamental facts of human psychology [that all human beings fear the loss of their lives]"[5]

[2] *Capraro Commission, pp. 43*
[3] *Id.*
[4] *Id. at 47*
[5] *Id. at 67*

Chairman Capraro wrote his own dissenting opinion, and in many ways it was his views which most accurately anticipated the future course of the debate over capital punishment. Capraro stated that, while he believed "that the overwhelming weight of statistical evidence generally tends to discredit the idea that capital punishment is a deterrent,"[6] he was still not convinced that "in some cases, particularly in cases which involve a hardened criminal and/or rapist killer, the existence of capital punishment does not act as a deterrent."[7] He therefore felt "obliged to conclude that capital punishment ought to be retained in certain cases."[8]

The work of the 1958 Commission brought the issue of capital punishment into focus and served to crystallize the arguments for and against the use of the death penalty. From the time the Commission finished its work, almost every subsequent legislative session became involved in heated debates over the question of abolition or implementation of the existing death penalty statute. Meanwhile, the de-facto moratorium on executions continued, even while the courts continued to pronounce the sentence of death for individuals convicted of murder in the first degree.

For a brief time in 1963, it seemed that the arguments of the majority members of the 1958 Commission would carry the day. With Endicott Peabody as Governor, the move to replace the death penalty with mandatory life imprisonment actually was successful in the State Senate by one vote (19 to 18 on a motion to order a third reading). The revision approved by the Senate vote would have retained the death penalty in one specific instance--any person under arrest for murder, or serving a life term for murder, who killed an officer or guard while attempting to escape "shall suffer the punishment of

[6] *Id. at 50.*
[7] *Id.*
[8] *Id.*

death.''[9] However, the House of Representatives voted down the Senate bill by the relatively close count of 124 to 108. [10]

The 1963 legislative debate over abolition of the death penalty was a bitter and exhausting experience. Not surprisingly, therefore, neither the Senate or the House brought the issue to the floor for a formal vote for the next three years.

However, in 1967, the issue once again came to the forefront. Governor John Volpe, noting that there were nine men currently on ''death row'' at Walpole, called for the creation of a new commission to attempt to resolve the long-standing contradiction between the law of the Commonwealth and the actual non-implementation of the death penalty. The Legislature agreed to the formation of a new commission, but at the same time added a crucial amendment to the bill establishing such a commission. As enacted by the Legislature, the measure contained a provision for placing on the ballot in the next election a referendum question which asked the voters: ''Shall the Commonwealth of Massachusetts retain capital punishment for crime.''[11] By this legislative action, a new factor - public opinion expressed through the means of a formal vote - was introduced into the debate.

Until the election of 1968, the initiative in the debate over capital punishment in Massachusetts belonged to its opponents. Supported by the recommendations of the majority members of the 1958 Commission, and encouraged by the near victory in 1963 in the Legislature, opponents had continued to press for repeal of the death penalty statute.

The results of the referendum of 1968 dramatically altered that situation. The voters cast 2,348,005 referendum ballots.

[9] *Journal of the Massachusetts House of Representatives, April, 1963*
[10] *Journal of the Massachusetts House of Representatives, May, 1963*
[11] *Journal of the Massachusetts Senate, October, 1967.*

In answer to the question: ''Should Massachusetts retain capital punishment'', 1,159,384 (49%) voted ''yes''. Voting ''no'' were 730,649 (31%). There were 498,008 blank ballots. Proponents of capital punishment now had statistical support for their argument that the general public wanted the existing death penalty law implemented. However, the Governors elected by the people between 1968 and 1978 - Volpe, Sargent, and Dukakis - each had a strong personal commitment to opposition to capital punishment. Consequently, the stalemate continued, but the Legislature in those years no longer debated bills to abolish the existing death penalty law. Rather, the debate in each legislative session following the referendum of 1968 focused upon provisions of the law which would retain the death penalty but avoid a veto by the governor.

By 1974 the Legislature had developed and enacted a bill which stated that ''whoever is guilty of murder in the first degree shall suffer the punishment of death.''[12] That bill also narrowed the definition of what constituted first degree murder to nine specific categories of crimes. On March 25, 1974, Governor Sargent vetoed the bill sent to him by the Legislature. The House of Representatives voted to override the veto, but by two votes the Senate failed to override the Governor.[13]

Although the 1974 bill failed to become law, the vote in the House, as well as the close vote in the Senate, demonstrated how dramatically the situation had changed in the years since 1963, when repeal of the death penalty nearly succeeded. Interestingly, in his veto message, Governor Sargent did not oppose capital punishment on moral grounds. He stated that he did not sign the bill because he thought that it raised ''significant constitutional questions.''[14] At the same time he endors-

[12] *Journal 716 Senate March 1974, pp. 306*

[13] *House Bill No. 5360 (1974); Journal of the Massachusetts Senate, April 1974*

[14] *Message from Governor, House 5540, March 25, 1974*

ed the idea of a limited death penalty, stating that "I would sign a capital punishment measure limited to killers of law enforcement officers, either police or correctional officers."[15] Governor Sargent's response was similar to the position taken sixteen years earlier by Chairman Capraro in his minority statement in the report of the 1958 Commission.

Having fallen just two votes short of overriding Governor Sargent's 1974 veto, proponents of the death penalty continued their effort in the following year. The 1975 General Court passed the same capital punishment bill (H 603) which had prevailed in 1974 but Governor Dukakis, who had succeeded Governor Sargent as the Commonwealth's Chief Executive, was personally opposed to the concept of capital punishment and, predictably, vetoed the 1975 measure.

The veto was conveyed to the Legislature by a gubernatorial message which recorded Governor Dukakis' quarrel with the death penalty. He relied upon his "own moral and ethical beliefs," dismissed the evidence of deterrence and he doubted the constitutionality of any death sentence legislation. [16] The mixture of personal preference and constitutional forecasting persuaded Governor Dukakis that he ought to upset the legislative determination in favor of capital punishment.

In response to the Governor's message, the House, as it had in 1974, easily overrode the veto. The override effort, however, was edged in the Senate where the 26-14 tally in favor of the override fell just one vote short of the required two-thirds total. The margin by which the override was defeated was so slight (one Senate vote) that the momentum generated by the demonstrated substantial legislative sentiment in favor of the

[15] *Id.*

[16] *Message from Governor, H5909, April, 1975*

death penalty was not derailed by the veto and the proponents regrouped to press their effort in subsequent sessions of the General Court.

However, even while the Legislature and the two Governors struggled with the sensitive issue, yet another new factor had emerged to alter fundamentally the course of the debate. Previously, the struggle for and against the death penalty had involved the Legislature, the Governors, and after the referendum of 1968, the voters of the Commonwealth. In 1972, the United States Supreme Court issued a ruling which influenced the debate on the question of capital punishment, not only in Massachusetts, but in every state of the nation. In its 1972 decision, *Furman v. Georgia,* the United States Supreme Court brought the third branch of our governmental system--the Judiciary--into the center of the controversy.

In its historic *Furman* opinion, the Supreme Court ruled, by a 5 to 4 majority, that capital punishment, when applied subject to a jury's discretion, was unconstitutional as a violation of the Eighth and Fourteenth Amendments' prohibition against "cruel and unusual punishment."[17] In their separate, concurring opinions, the Justices of the majority (Douglas, Brennan, Stewart, White and Marshall J.J.) concluded that, when left to an unguided jury, the death penalty could be applied in a manner that was "discriminatory. . . arbitrary. . . wanton and freakish", thereby violating the federal Constitution. [18]

As a result of the *Furman* decision, Massachusetts, along with every other state, found itself with no constitutionally acceptable death penalty statute. While the then-existing death

[17] *Furman v. Georgia, 408 U.S. 238, 240 (1972)*
[18] *Id. at 240-257, 257-306, 306-310, 310-314, 314-371.*

penalty law remained among the statutes of the Commonwealth, it was effectively neutralized by the *Furman* decision. Indeed, the Supreme Court cited the *Furman* opinion in vacating the death sentence in a Massachusetts case decided on the same day. [19] While the Supreme Judicial Court did not formally recognize the effect of the *Furman* decision until 1975, [20] as a practical matter, in the absence of a revised statute addressing the constitutional shortcomings described by the Supreme Court in *Furman*, there was no effective death penalty in the Commonwealth after 1972.

Soon after it embraced the *Furman* decision, the Massachusetts Supreme Judicial Court added its own ruling on capital punishment, this time basing its decision on a section of our state constitution--the Massachusetts Declaration of Rights. In *Commonwealth v. O'Neal* by a 5 to 2 majority, the Supreme Judicial Court in 1975 held that Article 26 of the Massachusetts Declaration of Rights [No magistrate or court of law shall. . . inflict cruel or unusual punishments''] imposed even stricter standards than the Eighth and Fourteenth Amendments of the United States Constitution.[21]

At issue in the *O'Neal* case was an apparent loophole left by the *Furman* decision. In Massachusetts, as well as many other states, murder committed in the course of rape or attempted rape carried with it a mandatory sentence of death. Because the death sentence was mandatory and did not permit juror

[19] *Stewart v. Massachusetts, 408 U.S. 845 (1972)*
[20] *Commonwealth v. Harrington, 367 Mass. 13 (1975)*

[21] Commonwealth v. O'Neal, 369 Mass. 242 (1975)

discretion in those circumstances, proponents of capital punishment argued that the vice of *Furman*--arbitrariness--was avoided. Relying on our state constitution, the Supreme Judicial Court countered that

> '. . . the mandatory death penalty for murder committed in the course of rape or attempted rape violates the Massachusetts Declaration of Rights and is unconstitutional. Accordingly. . . the case is remanded to the Superior Court where the defendant is to be resentenced to imprisonment for life.'[22]

Now, in Massachusetts, both the federal and state high courts had found capital punishment to be unconstitutional and by their respective rulings, had involved both the federal and state constitutions.

The full impact of the *O'Neal* ruling by the Massachusetts Supreme Judicial Court was demonstrated in 1977 when, in answer to a question presented to it by the House of Representatives concerning the constitutionality of a bill then before the Legislature, the Court answered that Article 26 of the Commonwealth's Declaration of Rights:

> forbids the imposition of a death penalty in this Commonwealth in the absence of a showing. . . that availabilty of that penalty contributes more to achievement of a legitimate State purpose - for example, the purpose of deterring criminal conduct - than the availablilty in like cases of the penalty of life imprisonment.[24]

[22] Id. at 243

[23] *Opinions of the Justices, 372 Mass 912, 919 (1977).*

[24] *Acts of 1979, Chapter 488, section 2*

The Massachusetts Legislature accepted the challenge issued by the Supreme Judicial Court's advisory opinion. In 1979 the Legislature enacted, and then-Governor Edward J. King signed, a statute which opened with the following words:

> It is hereby declared that the value of capital punishment as a deterrent for crime is a complex issue the resolution of which properly rests with the general court, which has evaluated the results of statistical studies. . . with a flexibilty of approach not available to the courts. . . It is hereby further declared that the ability of the people of the Commonwealth to express their preference through their duly elected representatives must not be shut off by the intervention of the judicial department on the basis of a constitutional test with an assessment of contemporary standards. .[24]

And in a direct reference to the 1972 *Furman* decision, the Massachusetts Legislature in its same 1979 enactment declared:

> that the following proposed legislation is the result of long study and review of the work and experience of other jurisdictions which have satisfied all the norms demanded by the Supreme Court of the United States to safeguard against all the elements of arbitrariness and capriciousness condemned by the said court in former death penalty statutes.''[25]

The response of the Commonwealth's Supreme Judicial Court was both predictable and swift. In a 1980 ruling, the Court declared that the new law ''contravenes the prohibition against cruel and unusual punishment contained in. . . the Declaration

[25] *Id.*

of Rights [of Massachusetts] on each of two grounds:(1) the death penalty is unacceptably cruel under contemporary standards of decency, and (2) the death penalty is administered with constitutional arbitrariness and discrimination.'' [26]

The 1980 ruling of the Massachusetts Supreme Judicial Court took on added significance for two particular reasons. It created a direct confrontation between two of the branches of government in the Commonwealth - the Legislature and the Judiciary. And, it continued the prohibition against the use of the death penalty in Massachusetts at a time when a number of other states had successfully restored the death penalty by adjusting their statutes in a manner that conformed with the requirements of the United States Supreme Court's 1972 decision in the *Furman* case.

As to the relationship between the Commonwealth's Judicial and Legislative branches, Justice Quirico, in his *Watson* dissenting opinion, specifically noted that in ''thus elaborating its view of contemporary morality, the court proceeds with no apparent regard for the constitutionally distinct roles of the judiciary and the Legislature.'' [27] Justice Wilkins, although joining in the majority decision, was constrained to note that the ''courts approach to these questions presents a constitutional confrontation between its views and those of the Legislature.'' [28]

In 1976, the United States Supreme Court had ruled on five cases involving statutes passed by various states in response to the *Furman* decision and had upheld the constitutionality of new laws enacted in Texas, Georgia, and Florida on the grounds

[26] *District Attorney for the Suffolk District v. Watson, 381 Mass 648, 650 (1980).*

[27] *Id. at 693*

[28] *Id. at 674*

that the guidelines set out in those statutes defining the meaning of "mitigating and aggravating circumstances" were specific enough to prevent juries and judges from acting in a "discriminatory or arbitrary" manner. [29] Consequently, the sole remaining constitutional roadblock to the death penalty in Massachusetts was the interpretation given to Article 26 of the Massachusetts Declaration of Rights by the majority of the Justices of the Supreme Judicial Court. The issue had become specifically one of state constitutional law.

Advocates of capital punishment now naturally focused their attention on Article 26 of the Massachusetts Declaration of Rights. A successful drive was initiated to put a referendum question amending the state constitution on the ballot for the election to be held in November, 1982. Voters were asked to approve or disapprove the following amendment:

> Article XXVI. . . is hereby amended by adding the following two sentences: No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of death by the courts of law having jurisdiction of crimes subject to the punishment of death. [30]

[29] *Gregg v. Georgia, 428 U.S. 153 (1976); Profit v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).*

[30] *Legislative amendment, "A proposal for a Legislative Amendment to the Constitution Providing for Capital Punishment." Senate Bill No. 1452 of 1982.*

The outcome of the referendum was even more decisive than the non-binding vote taken in 1967. A total of 2,103,780 ballots were cast. Voting "yes" were 1,131,668 (54%) voters; voting "no" were 748,549 (35%). There were 223,563 blank ballots cast. The amendment was ratified, the constitutional obstacle was removed, and the Legislature lost no time in enacting another statute. Governor King signed the bill into law on December 22, 1982, just fourteen days before he left office. [31]

It was this 1982 statute which was in effect when State Trooper George Hanna was murdered on the night of February 26, 1983. His death in the line of duty clearly fell within the first of the ten categories of crimes specifically listed in the new law as subject to the death penalty. The trial of the accused murderers of George Hanna would involve the first test of the constitutionality of the 1982 statute.

Given the complex history of capital punishment in Massachusetts, it seemed best to obtain an opinion on the constitutionality of the untested law before initiating a series of potentially lengthy, exhausting, and costly trials and appeals. Fortunately, our Massachusetts legal system permits a request to be presented to the state's highest Court for its opinion on the constitutionality of a new law before such a series of trials and appeals is undertaken. Upon a motion from my office, Justice John J. Irwin, the presiding judge, presented to the Supreme Judicial Court a request for its opinion on the provisions of the new statute. The Court allowed the request, and on October 18, 1984, found that the new law was indeed unconstitutional.[32]

[31] *Acts of 1982, Chapter 554.*

[32] *Commonwealth v. Colon-Cruz, 393 Mass. 150 (1984)*

However, on this occasion, the Court's decision did not rest on the general grounds that the capital punishment statute was "unacceptably cruel under contemporary standards of decency".[24] Rather, its finding concerned one specific section of the law relating to a defendant's option to proceed with or without a jury as a determinative body in his case. Under the wording of the statute, the death penalty could be imposed only if the defendant chose a trial by jury; in the event of a guilty plea, the presiding judge could not impose a sentence of death. Given this interpretation of the new law, the Justices of the Supreme Judicial Court were of the opinion that a defendant might impermissibly be discouraged from exercising his constitutional right to a trial by jury. Should that section of the law be changed to meet the *Colon-Cruz* objections of the Court, the law likely would be constitutionally acceptable.

With the question of constitutionality now limited to the technical wording of the law, rather than on the general grounds that capital punishment was a form of "unacceptably cruel" punishment, the State Legislature was in a position to amend the statute to conform to the Court's reservations. This process was initiated during the 1986 session of the Legislature but was not completed in time to reach the Governor's desk. Undoubtedly, it will be a major issue on the agenda of the Legislature in the near future.

[33] *See footnote 20, supra.*

John J. Conte, District Attorney for the Middle District in Massachusetts, has served in that Office since 1976. Prior to becoming District Attorney, he was a member of the State Senate for fourteen years, during which time he served both as chairman of the Judiciary Committee and as a member of the Governor's Select Committee on Judicial Needs. District Attorney Conte was born and raised in Worcester, and is a graduate of Holy Cross College and the New England School of Law. He is a member and past president of the Massachusetts District Attorney's Association, a member of the National District Attorney's Association, the Worcester County Bar Association, and the Massachusetts Bar Association.